Virginia Law Register

VOL. IX.] DECEMBER, 1903. [No. 8.

THE MODIFICATION OF THE SUPPLY-LIEN ACT AS AGAINST MINING AND MANUFACTURING COMPANIES.

On the 10th day of December, 1903, the Governor of Virginia approved House Bill No. 189, amending section 2485 of the Code of Virginia so as to cause it to read as follows:

Sec. 2485. Lien of employees, and so forth, of transportation companies, and so forth, on franchises and property of company. All conductors, brakemen, engine drivers, firemen, captains, stewards, pilots, clerks, depot or office agents, storekeepers, mechanics, *traveling representatives*[1] or laborers, and all persons furnishing railroad iron, engines, cars, fuel, and all other supplies necessary to the operation of any railway, canal, or other transportation company, and all clerks, mechanics, *traveling representatives*[2] and laborers who furnish their services or labor to any mining or manufacturing company, whether such railway, canal, or other transportation or mining, or manufacturing company be chartered under or by the laws of this State, or be chartered elsewhere, and be doing business within the limits of this State, shall have a prior lien on the franchises, gross earnings, and on all the real and personal property of said company which is used in operating the same to the extent of the moneys due them by said company for such wages or supplies; and no mortgage, deed of trust, sale, hypothecation, or conveyance executed since the twenty-first day of March, eighteen hundred and seventy-seven, shall defeat or take precedence over said lien: provided, however, that the lien secured by this provision to parties furnishing supplies shall be subsequent to that due to clerks, mechanics, and laborers, for services furnished as aforesaid: and provided, that if any person entitled to a lien as well under section twenty-four hundred and seventy-five, as under this section, shall perfect his lien given by either section, he shall not be entitled to the benefit of the other: and provided, also, that no right to or remedy upon a lien which has already accrued to any person shall be extended, abridged, or otherwise affected hereby.

2. This act shall be in force from its passage.

A comparison of this act with the former law as given in Pollard's Supplement, *in loc.*, will show that the single material

[1] and [2] New.

difference between the two, is the omission from the former law of the following words:

"And all persons furnishing supplies to a mining or manufacturing company, necessary to the operation of the same, shall have a *prior* lien *upon the personal property of such company other than that forming part of its plant* to the extent of the moneys due them for such supplies, and also a lien upon all the estate, real and personal, of such company, which said last lien, however, upon all such real and personal estate shall be subject and inferior to any lien by deed of trust, mortgage, hypothecation, sale or conveyance made or executed *and duly admitted to record prior to the date at which said supplies are furnished.*"

This addition was made to section 2485 of the Code of 1887 by the Act of February 15, 1892 (Acts 1891-2, p. 362).

The enactment of 1892 was obnoxious, from the standpoint of wise legislation, to several objections, but we believe that those now to be considered are of themselves sufficient to condemn it.

Its chief vice lay in the priority which it gave to the supply-man upon property not forming part of the plant over any lien by mortgage or other hypothecation not recorded. This was, whether intentionally or not, ingeniously expressed so as to suggest an opposite construction—namely, that the supply lien should be *subject and inferior* to any other lien which, however, note especially, *must have been recorded before the supplies were furnished.* Now, as a matter of business usage, it is not customary to record hypothecations of *personal* property, and the legal result, it was claimed, at once attached that, provided only the first item of a running account for supplies antedated the pledging by a manufacturing company of a bond, piece of commercial paper or personal asset of whatever nature, not forming part of its plant, as collateral security for the loan of money, the hypothecation, unless recorded, would be postponed to the supply-lien, although the greater part of it might have been for items furnished long after the hypothecation. This was the construction placed upon the act by the lower court in the case of *Millhiser Mfg. Co.* v. *Gallego Mills Co.*, ante p. 144, but one which the Court of Appeals pronounced in effect to be intolerable and not to be thought of. It does not require the leading of a court to cause any man of business experience to reach the same conclusion.

The Millhiser case was an eminently equitable decision as far as it went. But it did not reach the evil permitted by the act in the distribution of the assets of an insolvent corporation. The law

under that Act allowed such a condition as this: A mining or manufacturing company fails with $10,000 assets and $20,000 liabilities, divided as follows: $10,000 to a person who had furnished supplies, $9,000 to a person who had loaned it money, $1,000 to an insurance company for premiums on its plant. Result: the supply-man would be paid in full, the others would get nothing.

Not the least bad feature of the law was that, as a matter of practice, the preferred creditors were found to be largely non-residents of the state, while the home-creditors who had loaned money to help the company through its difficulties—perhaps, to pay these very supply-bills—were postponed. In the City of Richmond two years ago, a suit was brought by an insurance company, a creditor for premiums long over-due, to wind up an insolvent manufacturing company. The result was that the "supply-creditors" were paid in full, while the creditor who had furnished so inconsiderable a supply as insurance, received not a cent!

The truth is that the Act of 1892, passed as it was, in effect at least, in the interest of the supply-creditors, overshot the mark. It gave them more than any state in the Union, so far as is known to the writer, gives them. They asked and obtained too much. The wonder is that that Act was not repealed long ago. Had they been moderate in their demands by confining supplies to actual raw material; had they been given a simple lien, and had they provided reasonable limitations for its beginning and end; had they prescribed a period, as in the mechanics' lien acts, within which suit must be brought to enforce the lien—had they, in a word, paid proper regard to vested rights, whether recorded or not, it is probable that no very serious protest would have been made; but it is safe to say that the practical demonstrations of its dangers when presented to the committee and members of the General Assembly were of such a character as to shock the ordinary sense of justice and to cause the question to be asked, Is such really the law? And when this was answered in the affirmative, the amending act went through both branches of its own weight and merit, as the large majorities for it in both houses indicated. Behind what opposition there was to it could be plainly distinguished the voice of the supply-man—the preferred creditor—and no one will wonder. If the manufacturer himself, who was the alleged object of the tender solicitude of the measure of 1892, protested against the new law, his voice was not

heard. Strangely enough the party who hung around the halls of the legislature, whenever the measure was under consideration, was a manufacturer, pleading for its passage for the very life of his enterprise, because, he said, under the old law he could raise absolutely no money to pay his employees or carry on his business—though upon its repeal he was promised any reasonable credit.

The charge has been made that the new law was enacted in the interest of the banks, and occasion was taken to throw this populistic "odium" upon it. But as a matter of fact, the banks had, as a rule, ceased lending money to this class of corporations, at the risk of having their claims postponed to a pocket-lien filed months and, it might as easily be, years after the loan. If at all, they were interested only in removing this ban from the credit of an otherwise desirable line of borrowers and thus extending their business without more than the usual risk of sacrificing the entire debt.

We submit in conclusion that a life of ten years having proved abundantly the inequity and hardships of the former law, having demonstrated that it was really passed in the interest of the preferred creditors recognized by it, that its chief equity was inequality, that its spirit and effect have been rebuked by our court of last resort, and that its repeal was urged by its alleged beneficiaries, the legislature has acted wisely in correcting the mistake of its predecessor and in undoing this, certainly one of the most objectionable of all the forms of class legislation.

Any legislation that introduces into commercial transactions factors and elements whose essence is secrecy and uncertainty, is bound to disturb the smooth course of business with doubts and apprehensions which must result in a restriction or denial of credit—the life of commerce. This is what the Court of Appeals referred to in the Millhiser case when it said: "Such a construction would be disastrous to the laborer, the supply-man, the manufacturer and others conducting industrial enterprises. . . . It is of the highest importance, as has often been repeated by law writers and the highest courts of both England and America, to protect commercial credit, and this can only be done where commercial paper is held inviolable in the hands of *bona fide* holders. It has also often been repeated that courts should be especially careful not to throw doubt upon mercantile usages and the customs of business men."